

ORDINANCES

Paper or Plastic?

by Devala A. Janardan, Associate Counsel

The American Chemistry Council estimates that up to 90 *billion* plastic bags per year are used in the United States.[1] An increasing number of communities across the country believes that the widespread use of plastic bags has severe impacts on the environment, including unsightly litter, the additional burden on landfills, harm to marine and land animals, and the increase in consumption of crude oil, required in plastic production.[2] Several communities have passed, or are in the process of passing, laws that will either ban or restrict the use of plastic bags.

The City of San Francisco started the trend when it passed its Plastic Bag Reduction Ordinance (PBRO) in 2007.[3] The PBRO applies to two types of retail stores: supermarkets that sell dry groceries, canned goods, non-food items and some perishable items, with gross annual sales of at least $2 million; and retail pharmacies with at least five locations within city limits. Retail stores that come within the PBRO definitions can only provide the following types of bags to customers: those made out of compostable plastic or recyclable paper, or reusable bags made of any material.

The Town of Westport, Connecticut has gone one step further and banned the use of plastic bags for retail checkout use regardless of the size of the retail business.[4] The ban does not apply to yard sales, tag sales, plastic bags used by dry cleaners, sales by non-profit organizations, and sales by residents at their home.[5] The operative language states that "any person engaged in retail sales shall provide only reusable bags and/or recyclable paper bags as checkout bags to customers," and that the ordinance should not be interpreted as "preclude[ing] persons engaged in retail sales from making reusable bags available for sale to customers."[6] A similar ban by Maui County, Hawaii, states that "[b]usinesses are prohibited from providing plastic bags to their customers at the point of sale for the purpose of transporting groceries or other goods."[7]

While many communities are considering mandatory bans or severe restrictions on the use of plastic bags, other communities are, instead, pursuing voluntary programs. The City of Austin, Texas, passed a resolution in 2007 that adopted a plan to reduce the number of plastic bags entering the City's solid waste stream by 50%. Retailers that participate in the plan agree to make recycling bins in a highly visible area available to customers, to make affordable reusable bags available to customers, and to file a report on a biannual basis that specifies the pounds of plastic purchased and recycled.[8] Large retailers, such as Wal-Mart, Walgreen's, and Target are participating in this program and have reported a 20% increase in recycling rates and a 40% decrease in plastic bags provided to customers.[9]

Another option is to charge either the retail store or the customer a fee for every bag distributed at the checkout counter. New York City Mayor Michael Bloomberg has called for a five-cent tax imposed on every plastic bag used at retail store checkout counters. This tax, which will require approval by the state legislature, is expected to bring in $84 million in revenue for the City.[10]

Perhaps the real question is whether or not laws restricting the use of plastic bags will actually make a difference to the environment. Some reports suggest that a plastic bag ban will actually harm the environment. An article by MSNBC states that the production of paper bags creates 70 percent more air pollution than that for plastic bags, and that over 14 million trees are cut down each year to make paper bags.[11] In addition, paper bags require more storage space and are heavier, increasing transportation costs. A conversion from plastic to paper could simply change the source (or worse yet, increase the amount) of air pollution.

It's best to approach a request from your community executive to draft a complete ban on plastic bags with caution. San Francisco has not yet seen significant reductions in the number of plastic bags used in the community. According to San Francisco's own research, there were more plastic bags on the streets in 2008 than there were in 2007.[12] Perhaps, 2009 will be different; however, an astute municipal attorney should consider different avenues for reducing the number of plastic bags entering the waste stream.

One such option is to provide incentives to businesses to curb their use of plastic. Retailer IKEA, a home furnishings store, went out on its own and started charging customers a nickel for each plastic bag, and in one year, customer use of the store's plastic bags decreased by 92%.[13] A similar idea, approved by the Seattle City Council in July 2008, imposes a 20-cent fee on any plastic bag or disposable paper bag used at grocery, drug, and convenience stores. The American Chemistry Council spent over $180,000 on their successful efforts to get the issue on a ballot.[14] This August, voters will decide whether or not this measure will pass. Needless to say, the issue is not yet "in the bag."

Notes

1. *Judy Keen, Tide Turns Against Use of Plastic Bags*, USA TODAY, March 14, 2008, at http://www.usatoday.com/news/nation/environment/2008-03-14-plastic-bags_N.htm.
2. Maui County, HI, Ordinance Pertaining to Plastic Bag Reduction (July 14, 2008).
3. S. F. CAL., ENVIRONMENT CODE ch. 17, § 1701 (2007).

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to the risks that various options present, and provides municipalities with a roadmap for avoiding liability, if not litigation.

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14. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502-03 (1987).
15. *See, e.g.*, Texas Power & Light Co. v. City of Garland, 431 S.W.2d 511 (Tex. 1968); City of Tukwila v. City of Seattle, 414 P.2d 597 (Wash. 1966).
16. Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 896 (9th Cir. 2003).
17. AFSCME, Local 2957 v. City of Benton, 513 F.3d 874, 882 (8th Cir. 2008).
18. *Id.*
19. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983).
20. Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987).
21. Baltimore Teachers Union v. Mayor and City of Council of Baltimore, 6 F.3d 1012, 1017 (4th Cir. 1993).
22. United States v. County of Muskegon, 298 F.3d 569, 585 (6th Cir. 2002).
23. *See, e.g.*, Contributors to Penn. Hosp. v. City of Philadelphia, 245 U.S. 20 (1917) (eminent domain power cannot be surrendered by contract); Pub. Serv. Co. of Colo. v. City of Loveland, 245 P. 493 (Colo. 1926) (city officials lacked the authority to execute a disclaimer upon behalf of themselves or future city councils that would deprive them of the exercise of their eminent domain power); and Bd. of County Com'rs of Calvert County v. East Prince Frederick Corp., 559 A.2d 822 (Md. App. 1989) (County's policy requiring reserved sewage and water capacity to be used within two years or payment of minimum user fees did not offend the doctrine, as the County lacked the power to create sewer rights in perpetuity and effectively prevent the enactment of future laws to fit changed circumstances).
24. *See, e.g.*, Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC, 176 P.3d 737, 742-44 (Colo. 2007) (agreement to exercise eminent domain enforceable).
25. 478 P.2d 585 (Nev. 1970).
26. Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976).
27. Hudson v. City of Bossier City, 930 So.2d 881 (La. 2006).
28. City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (Iowa 1868) (Dillon's Rule states that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable).
29. The Seventh Circuit has made the interesting point that if a contract allows a party to pursue a claim for breach of contract, there is actually no impairment of the contract. Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250-51 (7th Cir. 1996). Under this rule, one could argue that the Hampton provision renders any Contracts Clause claim moot, because Verizon would retain the ability to sue for breach of contract under the same standards that would apply to a Contracts Clause claim.
30. *See* City of Covington v. Covington Lodge No. 1, Fraternal Order of Police, 622 S.W.2d 221 (Ky. 1981). ML

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plaintiff fell" at the time he broke his ankle. Nonetheless, the court held that the plaintiff failed to prove that the City was grossly negligent in the manner in which it handled the ploughing and/or sanding of the sidewalks. "All municipalities, especially large cities [,] have a monumental task to keep the public safe during all sorts of winter conditions," and the conditions at the time the plaintiff fell were a "unique situation."

The court dismissed the action, concluding with a request that the City not demand costs, as this "would only make the plaintiff's bad situation worse." ML

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4. Westport, CT, Retail Checkout Bags Ordinance (Sept. 5, 2008).
5. *Id.*
6. *Id.*
7. Maui County, HI., Ordinance Pertaining to Plastic Bag Reduction (July 14, 2008).
8. Austin, TX., Resolution No. 20070419-026 (Apr. 19, 2007).
9. *After a Year, Local Retailers Report Less Plastic Bag Usage*, Austin Business Journal, Nov. 18, 2008, at http://austin.bizjournals.com/austin/stories/2008/11/17/daily23.html.
10. Adam Lisberg, *Mayor Bloomberg Paints Grim Economic Picture for New York City 2009 Budget*, New York Daily News, Jan. 30, 2009, at http://www.nydailynews.com/ny_local/2009/01/30/2009-01-30_mayor_bloomberg_paints_grim_economic_pic.html.
11. Anne Thompson, *Paper or Plastic – What's the Greener Choice?* MSNBC.com, May 7, 2007, at http://www.msnbc.msn.com/id/18538484.
12. Joe Eskenazi, *The City's Politicos Made the Enviros Happy by Banning Plastic Bags, But Left Us With More Pollution and Cost*, SFWeekly.com, Jan. 07, 2009, at http://www.sfweekly.com/content/printVersion/1297386. See also, http://sfenvironment.org/downloads/library/2008_litter_audit.pdf.
13. Press Release, IKEA, *The Results are in ... over 92% of IKEA Customers Bagged the Plastic Bag!* (April 2, 2008) (on file with author).
14. Kathy Mulady, *$1280,625 to Fight 20-cent Bag Fee*, Seattle Post-Intellingencer, Sept. 11, 2008, at http://seattlepi.nwsource.com/local/378828_bags12.html. ML

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